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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Susan van Keulen, Magistrate Judge

IN RE: ZOOM VIDEO)
COMMUNICATIONS, INC.) NO. C. 20-02155-LHK
PRIVACY LITIGATION,)
)

San Jose, California
Tuesday, February 16, 2021

TRANSCRIPT OF REMOTE VIDEOCONFERENCE PROCEEDINGS

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Official Reporter, CSR No. 12219

1 Tuesday - February 16, 2021

10:01 a.m.

2 P R O C E E D I N G S

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4 **THE CLERK:** Please come to order. The Honorable Susan
5 van Keulen presiding.

6 **THE COURT:** Good morning. Good morning, everyone.
7 Welcome to the 10:00 calendar.

8 We have a couple of discovery matters on this morning. So
9 we will get underway. Ms. Fanthorpe, if you'll call the first
10 matter, please.

11 **THE CLERK:** Yes. Calling 20-CV-2155, In Re: Zoom
12 Video Communications, Inc. Privacy Litigation.

13 Counsel, please identify yourselves for the record
14 beginning with plaintiff.

15 **MR. MAYA:** Good morning, Your Honor. Theodore Maya
16 for plaintiffs.

17 **THE COURT:** Mr. Maya, good morning.

18 **MR. REDENBARGER:** Good morning, Your Honor, Tyson
19 Redenbarger for the plaintiffs as well.

20 **THE COURT:** Mr. Redenbarger, good morning.

21 **MS. HARTNETT:** Good morning, Your Honor. I am
22 Kathleen Hartnett from Cooley for defendant, Zoom.

23 **THE COURT:** Ms. Hartnett, good morning.

24 **MS. HARTNETT:** Good morning.

25 **THE COURT:** All right. We're on today pursuant to the

1 parties' joint submission for -- it's essentially plaintiffs',
2 a motion to compel production. The parties submitted a joint
3 statement; gave me a chart. I did issue a preliminary order
4 last week on the 9th to give the parties some guidelines and
5 further instructions for meet and confer.

6 So I want to stick to the -- we'll use the categories that
7 were identified in the parties' joint statement. And we'll
8 take the issues that way. And if anything has been resolved or
9 where progress has been made, you can tell me as we move
10 through it one at a time, and where there are open issues,
11 we'll get those resolved and get you back underway.

12 So why don't we go ahead and start then, Mr. Maya or
13 Mr. Redenbarger, who has the mic today for plaintiffs, at least
14 to the first category? Mr. Maya, all right.

15 The first category is third-party software integrations.
16 And as I indicated in my order, I do think that the plaintiffs
17 tri-level approach, such as it was, is workable. But with
18 quantitative limitations.

19 So were the parties able to meet and confer? Where is
20 there agreement and where are there still disputes?

21 Mr. Maya, I'll start with you.

22 **MR. MAYA:** Thank you, Your Honor.

23 And, yes, we met and conferred. We had two lengthy calls
24 on Friday and another yesterday, and we have exchanged letters
25 on Sunday and yesterday.

1 I just got a message that the recording has stopped.

2 THE COURT: That's fine. It looks like my courtroom
3 deputy dropped off, but that's fine.

4 MR. MAYA: Okay.

5 THE COURT: It's back. We've got the typical Zoom
6 gremlins at work. So -- welcome back, Ms. Fanthorpe, and we're
7 back on track.

8 Go ahead, Mr. Maya. Yes. Where were we?

9 MR. MAYA: So, Your Honor.

10 Yes, we have met and conferred. I think we have made
11 progress and thank the Court for its guidance in this order.

12 I am prepared and going to -- planning to speak to the
13 first category, third-party software integrations, today.

14 We think that the only other category we need to address
15 today is category 4, security misrepresentations. And for the
16 plaintiffs, Mr. Redenbarger would be speaking to that, just to
17 give you a roadmap.

18 THE COURT: Thank you.

19 MR. MAYA: On the third-party software integrations,
20 we have had made some progress, but unfortunately there is
21 still a significant dispute between the parties. We appreciate
22 the Court accepting our tri-level approach, which is set forth
23 in Exhibit 3 to that joint brief.

24 Zoom has agreed -- so, Your Honor, first of all, there is
25 three -- just to sum up those three levels that we've

1 discussed. One is marketplace apps flagged as having a
2 security advisory by Zoom. Zoom has informed us that there is
3 only one of those, the Marketo app, and has agreed to give
4 discovery concerning that, which we appreciate.

5 **THE COURT:** Okay.

6 **MR. MAYA:** The next is, third-party apps that are
7 found in Zoom's App Marketplace. And we identified five
8 categories that we were willing to cut it down to for purposes
9 in the joint motion. The Court found that still too many. And
10 during our meet and confer process, Zoom has not agreed to give
11 us anything on any marketplace apps beyond the Marketo app that
12 I already discussed.

13 The third level is the SDKs, which like marketplace apps,
14 is another method through which Zoom is alleged to have shared
15 its users' PII, private information impermissibly.

16 There, Zoom has agreed to give us two snapshots of the
17 SDKs in place along with the description of their functionality
18 for August and November 2020. We disagree that that's a good
19 time frame for this -- for these purposes. That is, after Zoom
20 removed the Facebook SDK, for instance, which the complaint
21 includes many allegations about -- although our allegations
22 about Zoom's sharing of information through such SDKs is not
23 limited to the Facebook SDK, as Zoom contends.

24 So, Your Honor, we have asked them for, if they can
25 provide snapshots for earlier time frames. They are looking

1 into that. We do think it's important that we get snapshots,
2 like, from the February and April 2020 time frames, for
3 instance, that were different. And we can identify the
4 versions of the app that we're looking for there --

5 **THE COURT:** Okay.

6 **MR. MAYA:** -- Your Honor. And one thing I didn't
7 mention with respect to those marketplace apps is we have
8 attempted to compromise beyond the five categories identified
9 there in Exhibit 3. We agreed to identify a hundred apps that
10 we think likely shared information. Zoom rejected that. We
11 agreed to limit ourselves to 50 in the first instance and Zoom
12 has rejected that compromise.

13 So, Your Honor, we would like at least -- if the Court
14 is -- you know, feels that the five categories is too much, we
15 would ask that we be permitted to, you know, in conjunction --
16 to work with our experts and identify 50 apps that we think,
17 based on what we can glean, are likely to bear fruit. And
18 identify those to Zoom and get discovery in the identified RFPs
19 responsive with respect to those marketplace apps.

20 **THE COURT:** All right. Mr. Maya, with regards to the
21 SDK the snapshots, I just want to be sure I'm understanding
22 plaintiffs' position that you would like four snapshots:
23 February, April, August, and November of 2020; is that right?

24 **MR. MAYA:** Zoom has asked us to identify them by
25 version of their software, rather than month.

1 **THE COURT:** Okay.

2 **MR. MAYA:** Your Honor, I have a list that is broader
3 than that, but if we can get four, that would be great.

4 **THE COURT:** Four snapshots and they would be
5 identified by: We want a snapshot of this version, this
6 version, and this version.

7 Is that correct?

8 **MR. MAYA:** We can do it by month or version, but Zoom
9 has told us it would prefer version; we can do that.

10 **THE COURT:** Okay. And your understanding is -- and
11 I'll turn to Ms. Hartnett obviously in just a moment -- but
12 your understanding is that Zoom has agreed to the August and
13 November snapshots; is that right?

14 **MR. MAYA:** Zoom volunteered those time frames. Those
15 are not time frames that we identified.

16 **THE COURT:** Okay.

17 **MR. MAYA:** My understanding is that Zoom already has
18 that information on hand and that's why they are proposing
19 those time frames.

20 **THE COURT:** All right. All right.

21 Okay. So as to the first category, the marketplace app
22 where there had been a security advisement, the parties are in
23 agreement. Zoom identified one and that will be produced, and
24 so that issue is -- has been addressed; correct.

25 **MR. MAYA:** That's correct, Your Honor.

1 **THE COURT:** Okay. And then we have the large, open
2 issue around marketplace apps. Okay.

3 All right. Ms. Hartnett, did Zoom make any kind of
4 counter on the marketplace apps? Where are we in terms of meet
5 and confer efforts?

6 **MS. HARTNETT:** Thank you so much, Your Honor.

7 And I don't -- if I could just take a brief step back just
8 to kind of explain how we got to the three-tier approach, I can
9 hopefully inform why we are sort of approaching it the way we
10 are, which is willing to work with them on the SDK issue, but
11 really concerned about the Marketplace app discovery just being
12 unjustified.

13 So basically they had -- we had been looking at these two
14 categories together and then, right before the joint statement
15 was submitted is when they put the three-tier structure in; we
16 hadn't really met and conferred on that. We had been looking
17 at the universe of apps beyond the three that are pled in the
18 complaint as sort of a collective universe.

19 And just to be clear on that as well -- so their complaint
20 actually has three specific, you know, pieces of software that
21 they are claiming create a problem. This is the Facebook
22 software development kit; the Google Firebase analytics SDK or
23 software development kit; and then LinkedIn Sales Navigator.

24 And so the Sales Navigator was a marketplace app. The
25 other two are SDKs. Your Honor may well be familiar with this

1 but SDKs actually parts of, like, software pieces that are
2 building blocks that can be used in Zoom's actual software.

3 And so to the extent that Zoom had incorporated SDKs in
4 its own product, Zoom Meetings -- so that's what we're, you
5 know, this case is all about, the -- some specific privacy and
6 security allegations about the Zoom Meetings product, Zoom was
7 willing to negotiate with -- and we actually don't think there
8 are SDKs beyond the two they have alleged are relevant. On the
9 other hand, information about what SDKs are in our product is
10 not something that is as easily publicly available to them --
11 (Court reporter interruption for clarification of the record.)

12 **MS. HARTNETT:** Apologies. Sorry. I hear you.

13 Just to back up, information about the SDKs is not
14 necessarily publicly available or evident to the plaintiffs.
15 And so Zoom believed that if we're going to expand beyond the
16 three integrations pled, that we should be doing that by giving
17 them information about SDKs, at most.

18 On the other hand, the app marketplace is a publicly
19 available website. The plaintiffs are able to go to that
20 website and look at all the apps. They can download them and
21 try to figure out if there is an issue with any particular one.
22 And they have done none of that.

23 So the LinkedIn Sales Navigator was something that came to
24 light through some public reporting last spring, when Zoom
25 became a popular product.

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1 And there were certain news reports about people possibly
2 having their anonymity inadvertently exposed through this
3 integration. No plaintiff in this case actually alleges to
4 have used or been exposed to this, but that's one of the
5 theories that they have specified. And so our concern is
6 taking that already very weak thread, any connection to
7 LinkedIn, which is at least pled, and connecting that to 50,
8 100, 300, 1,000 marketplace apps is just not relevant to the
9 actual claims in the case. It's disproportionate and it's
10 actually distracting us from trying to meet the March 5th
11 deadline with respect to the discovery about the actual claims
12 in the case. So, again, we don't --

13 **THE COURT:** So what is it that you are being asked to
14 produce -- and I'll let Mr. Maya also address this. But, with
15 regard to the marketplace apps, what is it that they are asking
16 for?

17 **MS. HARTNETT:** Our -- there hasn't been a limitation.
18 I think -- we can look back to the actual request itself, but
19 it wanted to discovery into all third-party integrations used
20 by --

21 **THE COURT:** Hold on, Ms. Hartnett. Ms. Hartnett, hold
22 on because you're breaking up.

23 **MS. HARTNETT:** My apologies.

24 **THE COURT:** That's all right. I don't think it's
25 intentional on your side. I want you to slow down, though.

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1 And if you speak slowly, that may help. You may be able to
2 stay up -- the Internet may be able to --

3 **MS. HARTNETT:** Keep up with me, I hear you.

4 So there is not really a limitation on what they seek
5 about the third parties' integrations beyond the ones pled in
6 the complaint. They were just asking for documents related to
7 those integrations.

8 With respect to the SDKs, our proposed compromise was to
9 give them a list of them, a description of the functionality,
10 user information, if any, that is transferred and any
11 information about remuneration. And that was for purpose of a
12 compromise.

13 And we really are prepared to in good faith work with them
14 on the SDK point. But simply looking on the Internet they
15 could find out what they need to find out about the marketplace
16 apps. They can decide if there is one that has an issue, like
17 they did with the Marketo app, and we would be open to hearing
18 that.

19 But the notion of just opening the door into discovery
20 about all information concerning things where they are not
21 relevant to the complaint, and they haven't identified any
22 issues is something that, to us, just seemed unfair and
23 inappropriate; and also just a tiered structure that was
24 imposed at the last minute for no real reason, although we
25 understand why Your Honor would have seen it as something

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1 coherent the way it was presented.

2 **MR. MAYA:** May I respond, Your Honor?

3 **THE COURT:** Yes, Mr. Maya. But I want you to respond
4 specifically with regards to the marketplace apps. If they are
5 available online and you can download an app and see if it has
6 any issues that might make it relevant to your claims.

7 **MR. MAYA:** Sure, Your Honor.

8 **THE COURT:** Let me just -- let me give you this
9 additional insight.

10 In approving the tiered structure, obviously, you know,
11 thus looking for structure, I was, as you could tell from my
12 order, most concerned about this marketplace because the idea
13 of getting hundreds of apps, or even 50 apps with no tie to any
14 allegations in the complaint is -- is not proportional to the
15 issues that are currently before the Court.

16 So, you know, if you -- I am looking at a -- if you got an
17 app in each of the five categories. But it would seem to me --
18 that's what I'm thinking. But to go there, even, there would
19 have to be justification. And it seems like, to Ms. Hartnett's
20 point, you could go to the app marketplace, you can pick one,
21 you can pick three, you can pick five in each of these
22 categories; download them; look at them; turn them over. And
23 then make a request saying: Look. We've looked and we're
24 seeing this, and this is what we need.

25 That would seem --

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1 **MR. MAYA:** Okay.

2 **THE COURT:** -- to be a reasonable approach.

3 **MR. MAYA:** Two points there. One, the idea that it's
4 not tied to the allegations in our complaint. It is. Our
5 allegations -- for instance, we allege that Zoom violates
6 plaintiffs' and class members' privacy by failing to implement
7 adequate review of these apps before integrating them. And
8 there is a variety of other allegations.

9 The LinkedIn app, which is the one that we know operated
10 to violate privacy, users would have no idea. They didn't have
11 to have that app downloaded on their end. And that's how these
12 apps work, or can work.

13 And contrary to Zoom's contentions, it's not at all clear
14 how these apps work from looking at them online and what
15 information they obtain.

16 However, our request asked for things like audits or
17 investigations that Zoom or perhaps third parties employed by
18 Zoom had done into these very issues. We're not asking Zoom to
19 create information or give us anything that it -- isn't already
20 in its possession, custody, or control, just to be clear.

21 But --

22 **THE COURT:** What are you asking for?

23 **MR. MAYA:** Well, there is a variety of requests
24 identified in category 1, and I would refer to the joint
25 discovery brief.

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1 But, for instance, what I'm referring -- you know, that
2 refers to RFP1 which is very broad. And, two, there are other
3 requests such as Request 14, which are looking for, like I
4 said, audits or analyses done by Zoom, or third parties.

5 We also have requests looking for -- aimed to get anything
6 that may have been produced to the Government, or any
7 government agency during those investigations, which have
8 occurred.

9 So I think to cut all that stuff off on the basis that
10 there is just too many apps is not fair. Our requests are not
11 necessarily looking -- you know, like that. We are looking for
12 investigations, audits, things like that. Furthermore --

13 **THE COURT:** Excuse me, Mr. Maya. Part of the problem,
14 of course, is the number and breadth of the requests; right?
15 Part of it is: What are the requests focused on here,
16 marketplace apps?

17 And the other piece of that is: But what are you asking
18 for?

19 It's the breadth of the requests.

20 So I'm going to put the marketplace apps on -- I'm going
21 to defer a ruling on that, and I want you to meet and confer.
22 And if you want to know if there have been audits, security
23 audits, or a report to the Government, something very specific,
24 you know, a couple of things as to some small number of apps in
25 each category, I'll consider that. But I want the parties to

1 go back and meet and confer on that.

2 But it sounds like there needs to be -- before I open the
3 door on all of these marketplace apps, on the request side
4 there needs to be a narrowing down in light of the
5 proportionality requirements.

6 **MR. MAYA:** Understood.

7 **THE COURT:** So that's how we'll handle the marketplace
8 apps. I'm giving the parties more direction and I want you to
9 meet and confer on that.

10 With regards to the SDKs, now, let me turn back to
11 Ms. Hartnett, because I didn't hear a response to Mr. Maya's
12 point of: Well, give us four snapshots by version, as opposed
13 to just two.

14 Why is that not a reasonable approach?

15 **MS. HARTNETT:** Your Honor, we are open to that, and
16 what we had told the plaintiffs was that we were just checking
17 on the technological feasibility. As Mr. Maya reported, we
18 happen to have that information.

19 We weren't picking August and November of this year to
20 exclude anything. It was because the information happens to be
21 available more readily, and so the tool that was used to
22 extract that information in August and November, we need to see
23 if it will function for the older versions. And so we were in
24 the process of meeting and conferring on that point.

25 **THE COURT:** Okay. All right.

1 And when do you anticipate to have a response as to
2 whether you can provide the information for snapshots for
3 February and April?

4 **MS. HARTNETT:** I believe in the next day or two, we
5 just need to check with the technical people at our client's
6 side.

7 **THE COURT:** Okay. All right.

8 Then for the third category, that would be to produce four
9 snapshots. And if you believe you have information that it's
10 not available or not retrievable, the parties can meet and
11 confer on that, but -- you know, and I will hear further if the
12 parties can't work that out. But, for now, the order is to
13 produce those four snapshots.

14 **MS. HARTNETT:** Understood, Your Honor.

15 **THE COURT:** Let me get my notes up to date here.

16 All right. That's the first category.

17 And, Mr. Maya, you said then, the open issue was the
18 fourth cat -- excuse me. Yes, the first category of dispute
19 and you said the remaining open issue was in the fourth
20 category; is that correct?

21 **MR. MAYA:** That's correct, Your Honor. And I'll allow
22 Mr. Redenbarger to speak to that.

23 **THE COURT:** Okay. This is with regards to the
24 security misrepresentations. And I had tentatively -- my
25 tentative ruling was to accept the defendant's proposal, which

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1 is to produce the -- excuse me, let me just track my note here.

2 To accept the defendant's proposal as set forth in
3 Exhibit 3 to the joint letter. But, I did let the plaintiffs
4 know that if there was an issue with regards to the end-to-end
5 encryption, it wasn't quite clear to me why that would be a
6 problem. But I would certainly let you be heard on that.

7 So, Mr. Redenbarger, I'll start with you, and then I'll
8 come back to you, Ms. Hartnett.

9 **MR. REDENBARGER:** Thank you, Your Honor.

10 So there are two issues that I would like to discuss. One
11 being the end-to-end limitation, and the second one being a
12 distinction between "enterprise" and "non-enterprise" clients.

13 So first with respect to --

14 **THE COURT:** So let's start in the upper left-hand
15 corner. Remind me what it is you're asking for here and what
16 the responses have been so far.

17 **MR. REDENBARGER:** Sure. So this category has to do
18 with Request 17 through 20 that focus specifically on
19 representations regarding Zoom's ability to provide encryption,
20 encryption of their meetings.

21 The plaintiffs have alleged that in early 2020, 2020, Zoom
22 wasn't capable of offering end-to-end encryption and, in fact,
23 Zoom wasn't capable of doing that until October of 2020.

24 So the important time period in this case involves a time
25 when Zoom just didn't have the capability to provide end-to-end

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1 encryption. And so plaintiffs don't believe that discovery
2 should be limited by an "end-to-end" term, it would exclude
3 potential relevant information.

4 And the parties, having seen your order, did meet and
5 confer on this issue, and we do agree on the scope. So the
6 parties agree that the scope should include the time period
7 when Zoom allegedly did not have end-to-end encryption, and the
8 discovery should include all the information related to
9 whatever version of Zoom services pre and post when they
10 actually were able to offer end-to-end encryption.

11 **THE COURT:** Okay.

12 **MR. REDENBARGER:** So we did make progress there.

13 **THE COURT:** Okay.

14 **MR. REDENBARGER:** However, we then ran across another
15 dispute relating to how to appropriately collect that
16 information. And the dispute arose when plaintiffs suggested
17 the use of a search term such as "encrypt," which, in this case
18 which involves encryption is, frankly, a common sense search
19 term. You know, we're dealing with a lot of claims related to
20 encryption, so we proposed the search term "encrypt," which
21 Zoom has rejected and continues to stand by the idea that this
22 discovery should be limited to "end-to-end," should have some
23 sort of narrowing, either a search term or scope that focuses
24 only on end-to-end; which, you know, for these reasons we don't
25 believe is appropriate.

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1 **THE COURT:** And the reason that the plaintiffs don't
2 want that limitation or don't believe that limitation is
3 appropriate is because the timing, because there is not
4 end-to-end encryption until late in the year?

5 **MR. REDENBARGER:** Correct. During the relevant time
6 period, there simply wasn't end-to-end encryption. And in
7 addition to that, internally at companies, it's unlikely that
8 every time Zoom refers to their encryption, they refer to it as
9 "end-to-end encryption." So we believe it's more appropriate,
10 when discussing encryption, that a search term would be rooted
11 with that base word of "encrypt."

12 So that's where the dispute on that issue is at this
13 point, according to --

14 **THE COURT:** That's really around search terms, how to
15 identify what you're looking for; is that right?

16 **MR. REDENBARGER:** Yes. Because we've agreed as to the
17 scope. The parties agree this is within the scope of
18 discovery, and now we've moved on to the next aspect of that.

19 So any guidance the Court is inclined to provide on that
20 search term issue, that would be helpful.

21 **THE COURT:** Okay.

22 **MR. REDENBARGER:** The second part has to do with the
23 distinction between "enterprise" and "non-enterprise" clients.
24 So an enterprise client is someone who bought Zoom by
25 contacting the sales department. A non-enterprise client is

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1 someone who went through the website, and clicked through the
2 Internet to buy service. So that's the distinction. They --
3 as far as we know, they still bought the same service so the
4 actual product doesn't differ, it's just how they ended up with
5 it.

6 And so generally in this case, plaintiffs don't agree to a
7 limitation to the non-enterprise clients. Zoom has been
8 attempting to limit discovery to non-enterprise clients.

9 And here there is a specific dispute as to Request 17.
10 Plaintiffs asked for a valuation and financial metrics related
11 to the -- what a customer may have paid for certain levels of
12 encryption, and that goes to plaintiffs' damages claims.

13 Zoom's proposal sought to limit that to the non-enterprise
14 clients only, which we don't believe is appropriate.
15 Regardless of which -- what customer paid for the services, any
16 valuation on this encryption service would be relevant to our
17 damages claims, because one of our key claims is that
18 plaintiffs received less than what they paid for.

19 They thought they were buying an end-to-end encrypted
20 service; they weren't receiving that. If enterprise clients
21 were receiving something different or paying on a different pay
22 structure, that would be relevant information.

23 And that's why we think just specifically Request 17,
24 which is narrowly tailored to this issue shouldn't be limited
25 by a distinction between "enterprise" and "non-enterprise."

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1 **THE COURT:** So your argument for not having that
2 limitation, not making that distinction is limited to
3 Request 17; is that correct?

4 **MR. REDENBARGER:** Yes, it is for -- that's how we
5 presented it in our joint statement.

6 I'll note that Zoom doesn't raise that limitation as to any
7 other of the requests, other than 2, 60, and 66. And generally
8 plaintiffs object to that limitation. But for purposes of
9 today, yes, it's Request 17 that's at issue.

10 **THE COURT:** Okay. And your putative class is -- is it
11 all users? What is it?

12 **MR. REDENBARGER:** Yes. Thank you.

13 That -- the class would -- it doesn't necessarily exclude
14 the enterprise clients. Plaintiffs' class may include -- very
15 likely include enterprise clients, so that is another reason
16 why this discovery would be relevant.

17 **THE COURT:** All right. Okay.

18 Ms. Hartnett, first issue is the appropriate search terms
19 to deal with the encryption, the scope on the encryption point.
20 So I appreciate the plaintiffs' proposal is "encrypt." That
21 could lead to a lot of irrelevant material. "End-to-end,"
22 perhaps is too colloquial to be of much use.

23 What is Zoom's proposal?

24 **MS. HARTNETT:** Thank you, Your Honor.

25 Just on this issue, I don't think we have a live dispute

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1 before you today because we just received plaintiffs' proposed
2 search terms yesterday. We had sent search terms about all our
3 topics to them a couple of weeks ago, and we had asked them to
4 get us back counter-terms so we can run -- get hit counts and
5 get a sense of whether or not -- which ones are unduly
6 burdensome. So I don't think it's correct, as Mr. Redenbarger
7 suggested that we've said no; although we strongly indicated
8 that an "encrypt" term alone would likely return massive
9 numbers of irrelevant documents. And so we would want to work
10 on that search.

11 So we have not yet, as I mentioned, we have not yet really
12 met and conferred on the search term issue. What we have done
13 is realized that we were talking past each other about scope.

14 Because -- and I don't need to argue the merits here --
15 part of their whole argument is that Zoom was saying its
16 product was end-to-end encrypted over the last couple of years
17 when, in fact, according to plaintiffs it was not. And so when
18 we said we would produce on end-to-end encryption we were not
19 trying to exclude the encryption in our pre-2020 product. We
20 were trying to describe it.

21 And so therefore, terms like "end-to-end encryption," in
22 our view, are actually going to return the relevant documents
23 from our internal documents because that's how people refer to
24 the product.

25 And so, I think what I would say at this point is that we

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1 should be permitted to a meet and confer with the plaintiffs
2 about search terms. They proposed a list of 125 or more to us
3 yesterday, and we have not yet had time to digest that or run
4 the hit counts to figure out what is going to be viable in
5 terms of incorporating those search terms going forward.

6 **THE COURT:** Well, assuming and your response is -- I
7 mean, it sounded like from Mr. Redenbarger's recitation and
8 from what you just said that, Zoom has already indicated that
9 using "end-to-end," coupling "encrypt" with "end-to-end" is
10 where it's headed. And they have already -- they, plaintiffs,
11 have voiced their disagreement with that. Are you telling me
12 that Zoom will work on that or -- I mean, if that's the
13 position, then let's just go ahead and deal with it.

14 **MS. HARTNETT:** No, Your Honor. I just do think,
15 genuinely, we need more time to confer on this. This is not an
16 attempt to go -- I'm just worried about taking on a burden
17 that's going to make completing our production not possible.

18 We had sent them a list of search terms, I believe, on
19 February 5th and it had several terms related to end-to-end,
20 and the list they sent yesterday, they did have "encrypt"
21 exclamation point, as one of their search terms. They also had
22 some additional, more narrow formulations that would include
23 additional within certain number, another word, that type of
24 thing.

25 We have not yet assessed those. And so it really is

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1 premature at this point to resolve a search terms dispute
2 before you. We're happy to have those negotiations quickly, so
3 if there needs to be another dispute before you, it can come
4 back.

5 **THE COURT:** Okay. All right.

6 **MS. HARTNETT:** And then -- sorry.

7 **THE COURT:** That's all right. Let me just make a
8 note. Let's get through those, and if there is any further
9 dispute -- because I am mindful of the calendar, and -- as are
10 the plaintiffs, as are all the parties -- and the class
11 certification date, and the document production date that I had
12 set out in my order.

13 So let's, you can meet and confer further and get back to
14 me if the parties are unable to agree, then make a submission
15 to me on the search term for category 4, a joint submission by
16 noon on Thursday.

17 **MR. REDENBARGER:** Your Honor, if I may. Zoom sent us
18 a letter yesterday indicating that the term "encrypt" was not
19 viable.

20 **THE COURT:** Okay.

21 **MR. REDENBARGER:** So to the extent we're reopening
22 that discussion --

23 **THE COURT:** What I hear Ms. Hartnett saying is there
24 are some other limitations that plaintiffs had proposed that
25 had not yet been assessed. That "encrypt" by itself was not

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1 viable. It sounds like perhaps the conversation isn't yet
2 concluded. So it sounded like you've taken -- plaintiffs have
3 taken the constructive approach of offering some other possible
4 limitations.

5 So I think it is appropriate to say, I think "encrypt" by
6 itself sounds too broad. "End-to-end" sounds too narrow. So
7 with that guideline and it sounds like there has already been
8 some proposals from plaintiff, so Zoom will have to roll up its
9 sleeves and take a hard look at those. And you all can discuss
10 them.

11 And if you can't agree, get back to me and give me some of
12 the, you know, additional narrowing search terms that
13 plaintiffs have proposed. And, you know, I'll hear the parties
14 briefly, maybe. Maybe I'll just look at it on the papers and
15 we'll get it resolved.

16 **MR. REDENBARGER:** Thank you.

17 **THE COURT:** Okay. So let's turn to the
18 "enterprise/non-enterprise" issue. Just in the context of
19 Request 17, which is for the business valuation of encryption
20 capabilities.

21 Ms. Hartnett?

22 **MS. HARTNETT:** Thank you, Your Honor.

23 So I do think that Mr. Redenbarger accurately described
24 the main distinction between the enterprise and the
25 non-enterprise products, which is that they get individually

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1 negotiated when they are enterprise. And, therefore, as you
2 said, they don't end up with the product through the same
3 process.

4 I think that our view is that the enterprise customers
5 could never be part of the class in this case. There are 14
6 plaintiffs, all of them are either individuals or there are two
7 churches, small businesses, all of which, to the extent they
8 purchased something from Zoom was the off-the-shelf version of
9 the product. And therefore, our view is that it begins to
10 unduly expand this case to start encompassing enterprises
11 which, as you're familiar, are the larger corporations that use
12 and deploy -- they are the ones that essentially used Zoom
13 before Zoom became something that everyone uses.

14 And so because they have no plaintiff that is an
15 enterprise customer and they would not be able to represent
16 those plaintiffs as part of their class, we took the -- took
17 the view that we need to constrain the discovery in this matter
18 to non-enterprise customers.

19 And here, to the extent there would be some damages theory
20 that plaintiffs are going to construct for this upcoming class
21 cert motion or otherwise, it would be about the damage and the
22 potential harm to those people that are in their class, or
23 their putative class, which would have to, by necessity --
24 given that they have no enterprise plaintiff -- be
25 non-enterprise customers.

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1 And, again, this is an effort to continually try to pare
2 down what started out as extremely broad requests about any
3 security or privacy issue for anyone in trying to tailor them
4 to the actual plaintiffs and claims in this case, and the class
5 that they could actually represent if they get to that point.

6 **THE COURT:** All right.

7 **MS. HARTNETT:** Sorry. I just would -- I just -- one
8 other distinction that might be relevant is that the enterprise
9 customers typically have a sophisticated IT department that
10 would be engaging with Zoom and helping to negotiate and figure
11 out what configuration works with the enterprise. And so I
12 think some of the representations about it essentially being
13 the same product are not accurate. We don't need to get into
14 them here because we just think it's categorically not at issue
15 in this case.

16 **THE COURT:** All right. Final word, Mr. Redenbarger?
17 It's your motion, final word.

18 **MR. REDENBARGER:** Thank you.

19 So putting aside whether enterprise clients are in the
20 class, this is still relevant information, what a customer may
21 have paid for a certain level of encryption; that can help
22 guide plaintiffs' damages analysis in our claim.

23 Another important point is that Zoom has in the past
24 distinguished who gets what levels of encryption. So, for
25 example, in June of 2020, Zoom announced that paid customers

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1 would be getting the better level of encryption, and free
2 customers would be not.

3 So we're not coming up with these distinctions. It's Zoom
4 who has, at times, placed different restrictions on who
5 receives what level of encryption. And what Request 17 asks
6 is, you know, is there any internal valuation of that financial
7 metric. And, again, this is very limited issue. We're not
8 taking discovery on all enterprise clients at all. It's
9 related to this one valuation issue and we believe it's very
10 relevant. So --

11 **THE COURT:** All right. Thank you. Okay.

12 On category 4 I'm going to, with regards to the
13 "enterprise/non-enterprise issue," I will remain with my
14 tentative ruling, which is to accept the defendant's proposal
15 and limit it to the non-enterprise.

16 I appreciate plaintiffs' argument, but I don't see
17 valuation of any features of the app in the enterprise context
18 as relevant to the case at this time. At this time.

19 And that may change once you have class certification and
20 the parameters are drawn. It may change as discovery goes
21 forward. So at this time as to Request 17, for business
22 valuation, I will stay with my ruling to limit that to
23 non-enterprise.

24 As to the search term issue, the parties, as I said a
25 moment ago, are to meet and confer further over narrowing and

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1 finding some common ground between "encrypt" and "end-to-end."
2 And I hope with that guidance you're able to. If not, make a
3 submission to me by noon on the 18th.

4 And you have my ruling from category 1.

5 So that, I think, takes care of all the open issues before
6 us for today.

7 Mr. Maya, was there anything that I overlooked?

8 **MR. MAYA:** Well, just, Your Honor, we're supposed to
9 meet and confer regarding the Marketplace apps, I believe.

10 **THE COURT:** That's right.

11 **MR. MAYA:** And I do hope that we're able to resolve
12 the dispute through that process; but in the event we're not
13 able to, should we be addressing that in our Thursday --

14 **THE COURT:** Yes, exactly. That would make sense.

15 We'll do that all in one. And, again, on the Marketplace apps,
16 it's got to be narrowed on both ends. On -- narrowed requests
17 focused to a narrow set of apps, and I will consider the issues
18 of relevance and proportionality in that context. Right now,
19 it's too big to even sort.

20 **MR. MAYA:** Your Honor, speaking to proportionality,
21 there was a point that I didn't get to make there that I think
22 might be helpful.

23 Is that, you know, we have looked into, with experts,
24 employing man-in-the-middle technologies and looking at network
25 traffic to try and figure out what information is getting

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1 transmitted to what third party through these apps.

2 That -- to test all the apps, it would cost about
3 \$5 million. The cost is very high. And that's why we do think
4 it would be appropriate to just get the documents that Zoom
5 has, whatever it may have, on these issues.

6 **THE COURT:** All right. Okay. Thank you. This
7 matter --

8 **MS. HARTNETT:** Your Honor?

9 **THE COURT:** Yes?

10 **MS. HARTNETT:** Can I just speak to -- one word,
11 briefly on timing because you did order by March 5th us to
12 produce, and I wanted to update you on that.

13 We are about 25 percent, approximately, to the point of
14 completing what we had agreed to produce as of the joint
15 statement. We have about 31 contract reviewers working on
16 this; we have three review project managers; and we have seven
17 attorneys at Cooley focused on this part of the case, on the
18 document production.

19 **THE COURT:** Right.

20 **MS. HARTNETT:** We can make our March 5th deadline as
21 far as we know currently, based on the list of custodians and
22 terms we are using, and based on the scope that we were doing
23 as of the joint statement. I just wanted to flag for
24 Your Honor that an expansion into a bunch of Marketplace apps
25 or encryption search terms, that would be much broader will

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1 make March 5th harder, and possibly not possible.

2 So I don't mean to get ahead of where we are. I just
3 wanted to flag for you that we're working in good faith to meet
4 your deadline, and think we can do it; will do it. But to the
5 extent it's a much broader universe of documents, that will be
6 harder.

7 And a lot of those documents, we respectfully submit, are
8 not relevant to class certification. So to the extent that
9 that's an issue, that might inform the timing of additional
10 orders, we can flag that for you on Thursday if we are unable
11 to agree.

12 **THE COURT:** I would expect that issue specifically --
13 let's say the parties are able to come to some agreement around
14 the Marketplace app issue, but for the timing, I would expect
15 that to be on the table and thoroughly vetted by the parties
16 through meet and confer. Because it's putting -- the March 5th
17 deadline is driven by the class certification deadline. And
18 that way, plaintiffs have all the information they need as to
19 whether or not -- if they get something they are asking for in
20 discovery, whether or not they need it for class certification;
21 whether or not if it is so critical that this is an issue to
22 raise with Judge Koh on scheduling.

23 So I expect those issues to be thoroughly, thoroughly
24 vetted by the parties before it gets to me. Because it's
25 really being driven by the trial court schedule, and plaintiffs

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1 may need to make some choices or one of those choices, perhaps
2 seeking relief. But let's be sure that they have a full and
3 clear understanding. It's not good enough just to say: Well,
4 this is a lot more work and it's going to take a lot longer.

5 There needs to be, you know: Here are milestones. Here
6 is where we can reach them. Here are the resources we're
7 putting to it and here is the deadline.

8 So, again, I'm very pleased. The parties obviously have
9 been talking. This is a complicated case. There is a lot of
10 ground to cover. So I want the parties to keep that up. Okay?

11 All right. I'm going to move to the next matter. Thank
12 you all very much. Thank you for your preparation today. I
13 appreciate it.

14 **MS. HARTNETT:** Thank you.

15 **THE COURT:** I'll hear from you, if necessary, on
16 Thursday. Thank you.

17 **MS. HARTNETT:** Thank you, Your Honor.

18 **MR. MAYA:** Thank you, Your Honor.

19 (Proceedings adjourned at 10:49 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Sunday, February 21, 2021

Ruth Levine Ekhaus, RDR, FCRR, CSR No. 12219
Official Reporter, U.S. District Court

Ruth Lerner